IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 10, 2007 Session

CARLA MARIE WALL ET AL. v. HILLSIDE HOSPITAL, INC. ET AL.

Appeal from the Circuit Court for Giles County
No. CC-10767 Jim T. Hamilton, Judge

No. M2005-02529-COA-R3-CV - Filed January 31, 2008

This appeal arises from a medical malpractice action brought by a patient and her family. The plaintiffs claimed that the defendants, a hospital, treating nurses, treating physician, and the treating physician's medical group, committed medical malpractice by giving the patient a medication dosage ten times higher than the correct dose, thereby causing her respiratory arrest. The defendants moved for summary judgment, insisting, among other things, that although the dosage was initially incorrectly entered on the chart, the patient never received the incorrect dosage. The plaintiffs offered no evidence in response but, instead, filed a notice of voluntary dismissal without prejudice and asserted their expert witness had become uncooperative. The trial court denied their request for a voluntary dismissal without prejudice and awarded summary judgment to the defendants. The plaintiffs appealed, arguing that the trial court abused its discretion by not allowing them to non-suit their action without prejudice. We conclude that the trial court did not abuse its discretion, and we affirm the dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which and WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

John H. Norton, III and Cara E. Gruszecki-Smalley, Shelbyville, Tennessee, for the appellants, Carla Marie Wall, Edward Keith Wall, and Tiffany Wall.

Bryan Essary, Nashville, Tennessee, for the appellees, Hillside Hospital, LLC, d/b/a Hillside Hospital, Donna M. Watson, L.P.N., and Jennie E. Heflin, R.N.

Tom C. Corts, Nashville, Tennessee, for the appellees, Giles Family Health Center, P.C., Akram Haggag, M.D., and Salah Muhamed Faour, M.D.

OPINION

I. A MALPRACTICE CLAIM

Carla Marie Wall was admitted to Hillside Hospital on December 27, 2003, with a diagnosis of acute multiple sclerosis exacerbation, optic neuritis of the right eye, and severe eye pain. On December 28, Ms. Wall went into respiratory arrest; she was resuscitated and treated. Ms. Wall was released from the hospital on January 1, 2004. Ms. Wall, her husband Edward Wall, and their daughter Tiffany Wall (hereinafter collectively the "Walls") came to believe that the respiratory arrest was caused by Ms. Wall being given an incorrect dosage of medicine.

The Walls[1] brought suit against Hillside Hospital, LLC, Giles Family Health Center, Drs. Akram Haggag and Salah Muhamed Faour, L.P.N. Donna M. Watson and R.N. Jennie E. Heflin (hereinafter collectively "Defendants"). The Walls alleged that an improper dosage of Dilaudid was administered to Ms. Wall in the hospital, 30 milligrams ("mgs.") rather than 3 mgs.[2] Consequently, they claim, Ms. Wall suffered injuries, the in-hospital respiratory arrest, as a result of medical malpractice during her stay in the hospital.

Hillside Hospital and nurses Watson and Heflin ("Hillside Defendants") filed a motion for summary judgment, followed shortly thereafter by the filing of a motion for summary judgment by the Giles Family Health Center and Drs. Faour and Haggag ("Physician Defendants"). The filings in support of the motions for summary judgment, including an affidavit from Dr. Faour, Ms. Wall's medical records, and an affidavit from expert witness Dr. Donna Seger, provided the following evidence: On December 27, 2003, the date Ms. Wall was admitted to the hospital, Dr. Faour mistakenly ordered 30 mgs. of Dilaudid to be administered to Ms. Walls every four hours. Three milligrams is the proper dosage.

However, according to Defendants, Nurse Watson called Dr. Faour to confirm what appeared to be an incorrect dosage of Dilaudid before administering it. After their conversation, the dosage was changed to the correct dosage. Defendants contend that Ms. Wall never received an incorrect dosage, because the paperwork error was caught before the drug was administered. They assert the

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[1]Edward Wall and Tiffany Wall both seek damages for loss of consortium. Tiffany Wall also makes a claim for infliction of emotional distress based upon seeing her mother being treated for a respiratory arrest that allegedly occurred as a result of Defendants' negligence.

[2]In their complaint, the Walls claimed that too much Dilaudid was administered (30 milligrams instead of 3 milligrams) and that it was administered too early, with the last dosage of Dilaudid being given two hours earlier than prescribed. However, during the course of the litigation, the too-early theory appears to have increasingly disappeared with the too-much theory becoming the focus of the case. The Walls' appellate attorney, Mr. John Norton, was questioned during oral argument regarding whether the plaintiffs were proceedings under any theory of negligence other than that 30 milligrams of Dilaudid was administered rather than 3 milligrams, the too-much theory. He answered no.

> Judge Koch: Was there any other theory of negligence in this case other than the mistaken original prescription for 30 milligrams of Dilaudid which the nurse called the doctor hours later and said you really want me to give this and the doctor said that is right change that to 3. Is there any other theory:
>
> Mr. John Norton [Counsel for the Walls]: No your honor.

medical records support the contention that the errant dosage was never administered and note that 30 mgs of Dilaudid would have likely killed Ms. Wall.

A summary judgment hearing was initially set for Wednesday August 3, 2005. Prior to the August hearing, however, the parties agreed to reset the hearing and agreed that the Walls would file their response to the summary judgment motion by August 26, 2005. The agreement was stated in a document that was intended to be an "Agreed Order" and was so titled. However, that document was never approved by the judge and it was never filed with the clerk. Thus, it was not an order. Notwithstanding the fact the parties' agreement was not entered as an order, the parties agreed to set the hearing for September 23, 2005, they agreed the Walls would file their response to the motion for summary judgment by August 26, 2005, and significantly they agreed that "Plaintiff's counsel has until the 26th day of August 2005 to file her Response to all Defendant's Motions for Summary Judgment. If no response is filed by the Plaintiff on or before August 26, 2005, the Motions filed by the Defendants will be granted without the need of proceeding to hearing on September 23, 2005." The Walls, while noting that this order was "never placed of record," do not dispute that they agreed to its terms.[3] Furthermore, the Walls acknowledged during oral argument that the fact this "agreed order" was never filed is irrelevant.

Instead of filing a response to the motions for summary judgment, the Walls filed a notice of voluntarily non-suit on the last date to respond to Defendants' summary judgment motions, August 26, 2005. In response, Defendants collectively filed a motion to enter an order dismissing the matter with prejudice and granting them summary judgment. Defendants argued that under Rule 41.01 of the Tennessee Rules of Civil Procedure, filing a notice of voluntary dismissal is improper while summary judgment motions from adverse parties are pending. Defendants also noted their prior agreement to two continuances and that the most recent agreement included a provision that summary judgment would be granted if the Plaintiffs did not file responsive briefs by August 26, 2005.

The Walls responded by arguing that whether to allow a non-suit during the pendency of a motion for summary judgment is within the court's discretion. The Walls offered the following explanation for having non-suited the case:

> Plaintiff was forced to take a voluntary non-suit due to the non-cooperation of an expert witness. Plaintiff ha[d] contact[ed] Michael Byas-Smith, from Emory University in Georgia to be the Plaintiff expert. However, at the last minute, Dr. Byas-Smith became uncooperative and would not agree to continue to be the expert in this

[3] The Walls referenced the agreed order in their "Plaintiff's Response to All Defendant's Motion to Enter Order Dismissing Matter With Prejudice." Specifically, therein the following is stated: "Undersigned counsel requested the second continuance, which Defense Counsel graciously granted. The matter was set to be heard on September 23, 2005, but the Order entered for said continuance indicated that the responsive briefs were due by August 26, 2005." Attorneys for the Hillside Defendants noted in their brief that counsel for the Walls received permission to sign and file the Agreed Order for a Continuance, which the Walls' counsel apparently never filed.

> case. Due to the unexpected events, Plaintiff was unable to file the required response to Defendants' Motions for Summary Judgment. Thus, a non-suit was the only available avenue left to pursue.

On September 23, 2005, a hearing was held in which the merits of the summary judgment motions and of the notice of voluntary non-suit were addressed.[4]

In its order entered on September 30, 2005, the circuit court stated the following: "On August 26, 2005 Plaintiffs filed a Notice of Voluntary Non-Suit seeking a voluntary dismissal without prejudice. Rule 41.01 of the Tennessee Rules of Civil Procedure, prohibits a voluntary dismissal when a Motion for Summary Judgment made by an adverse party is pending. This was not a proper response to the Motions for Summary Judgment."

The circuit court also noted that the Defendants had twice agreed to continuances and also stated that parties had reached an agreement that "required Plaintiffs to file responsive briefs on or before Friday, August 26, 2005 and further stated that if briefs were not filed, the Motions for Summary Judgment would be granted." Furthermore, the court indicated that "[t]here is nothing in this case to litigate. The entire case would rise or fall on the allegations of negligence by the Defendants resulting in the Plaintiff being injected with 30 mgs of Dilaudid which would probably have killed her. This just did not happen." Lacking a response from the Plaintiffs to the Defendants' motions for summary judgment, the circuit court concluded that the facts were undisputed and awarded summary judgment to the Defendants. This appeal followed.

II. VOLUNTARY DISMISSAL

Tennessee Rule of Civil Procedure 41.01(1) restricts the ability of a plaintiff to voluntarily dismiss an action while an adverse party's summary judgment motion is pending. The Rule provides as follows:

> Subject to the provisions of Rule 23.05, Rule 23.06, or Rule 66[5] or of any statute, and **except when a motion for summary judgment made by an adverse party is pending, the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice by filing a written notice of dismissal at any time before**

[4] These proceedings were not transcribed, but the Walls and Defendants agree that the merits of the notice of voluntary non-suit were discussed. The Walls state in their appellate brief that "[o]n September 23, 2005, a hearing was held before the Honorable Jim T. Hamilton, Circuit Court Judge, where the Appellants argued the merits of the Notice of Voluntary Non-Suit." In response, the Hillside Defendants state the following: "Appellants suggest that this hearing was for the purpose of arguing the merits of the Notice of Voluntary Non-suit. While they may have *chosen* to argue this moot point, the hearing was held on the pending Motion(s) for Summary Judgment, as evinced by the language of the resulting Order of Dismissal." (internal citations omitted) (emphasis in original).

[5] These Rules impose restrictions on voluntary dismissals of class actions (Tenn. R. Civ. P. 23.05), derivative actions (Tenn. R. Civ. P. 23.06), and actions involving appointed receivers (Tenn. R. Civ. P. 66).

> **the trial of a cause and serving a copy of the notice upon all parties**, and if a party has not already been served with a summons and complaint, the plaintiff shall also serve a copy of the complaint on that party; or by an oral notice of dismissal made in open court during the trial of a cause; or in jury trials at any time before the jury retires to consider its verdict and prior to the ruling of the court sustaining a motion for a directed verdict. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of plaintiff's motion to dismiss, the defendant may elect to proceed on such counterclaim in the capacity of a plaintiff. (emphasis added)

A well-established corollary of that rule is that when a motion for summary judgment is pending, a plaintiff may not take a voluntary nonsuit to dismiss an action without prejudice by simply filing a notice. However, nothing in the rule precludes a plaintiff from filing a motion requesting that it be allowed to take a non-suit or prohibits the trial court from granting or denying that motion. In the present case, the Walls filed a notice of dismissal rather than a motion to be allowed to take voluntary dismissal without prejudice. Consequently, the trial court's statement that the notice was not a proper response to the motion for summary judgment was correct.

Nonetheless, since the Walls appear to interpret the trial court's statement as a denial of dismissal without prejudice on the basis of a belief that it had no discretion to allow a nonsuit, we will analyze the court's ruling as a denial of a motion to voluntarily dismiss without prejudice. Of course, that means that, for purposes of this opinion, we will consider the Walls' notice of dismissal as if it were a motion.

The Tennessee Supreme Court has stated that Tenn. R. Civ. P. 41.01(1) "contains no specific authorization for [voluntary dismissal by court order], but it is implicit in the Rule and inherent in the power of the Court that, under a proper set of circumstances, the Court has the authority to permit a voluntary dismissal, notwithstanding the pendency of a motion for summary judgment." *Stewart v. University of Tennessee*, 519 S.W.2d 591, 593 (Tenn. 1974). Thus, it is within the discretion of the trial court to grant or deny a motion for voluntary dismissal, depending upon the circumstances.

We review a determination on whether to allow a voluntary dismissal without prejudice while a motion for summary judgment is pending for abuse of discretion. *Anderson v. Smith*, 521 S.W.2d 787, 790 (Tenn. 1975); *Beal v. Walgreen Co.*, No. W2004-02925-COA-R3-CV, 2006 WL 59811, at *4 (Tenn. Ct. App. Jan 12, 2006), (perm. app. denied, Tenn. May 30, 2006). The "abuse of discretion" standard of review calls for less intense appellate review and, therefore, less likelihood that the trial court's decision will be reversed. *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000); *White v. Vanderbilt University*, 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999).

A trial court's discretionary decision will be upheld as long as it is not clearly unreasonable, *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001), and reasonable minds can disagree about its

correctness. *Eldridge v. Eldridge,* 42 S.W.3d 82, 85 (Tenn. 2001); *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000). Courts making discretionary decisions, however, must take the applicable law and the relevant facts into account. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). Accordingly, a trial court has "abused its discretion" when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Woodlawn Memorial Park, Inc. v. Keith*, 70 S.W.3d 691, 698 (Tenn. 2002); *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001); *Eldridge,,* 42 S.W.3d at 85.

III. THE DENIAL OF VOLUNTARY NONSUIT

As discussed above, while the trial court was correct to note that the plaintiffs' notice was not a proper response to the Defendants' motion for summary judgment, Rule 41.01 does not preclude the exercise of the trial court's discretion to grant a motion for voluntary dismissal when a motion for summary judgment is pending, if and when the circumstances warrant.

As a general rule, when the determination is within the court's discretion, a motion seeking a voluntary dismissal without prejudice should be granted absent legal prejudice to the defendant. *Oliver v. Hydro-Vac Servs. Inc.*, 873 S.W.2d 694, 696 (Tenn. Ct. App. 1993)*; Hamilton v. Cook*, No. 02A01-9712-CV-00324, 1998 WL 704528, at * 5 (Tenn. Ct. App. Oct 12, 1998) (no Tenn. R. App. P. 11 application filed); *Price v. Boyle Inv. Co.*, 1990 WL 60659, at *3 (Tenn. Ct. App. May 11, 1990) (perm. app. denied June 11, 1990). The possibility of being subject to a second lawsuit alone is insufficient legal prejudice to bar a voluntary dismissal without prejudice. *Oliver v. Hydro-Vac Servs. Inc.*, 873 S.W.2d at 696; *Price v. Boyle Inv. Co.*, 1990 WL 60659, at *3.

Courts, however, are not automatically required to permit a plaintiff to voluntarily dismiss his or her case without prejudice. *Gordon v. Wilson*, No. 02A01-9611-CV-00282, 1998 WL 315940, at *7 (Tenn. Ct. App. June 17, 1998) (No Tenn. R. App. P. 11 application filed). Rather, the question addressed by a court in determining whether to allow a voluntarily dismissal without prejudice is whether the case presents the "proper set of circumstances" for allowing such a dismissal despite a pending summary judgment motion. *Stewart v. University of Tennessee*, 519 S.W.2d at 593; *see also Bailey v. Parkridge Hosp., Inc.*, No. 03A01-9303-CV-00135, 1993 WL 310359, at *2 (Tenn. Ct. App. Aug. 16, 1993) (No Tenn. R. App. P. 11 application filed) (stating that "a trial judge, in the exercise of his [or her] sound judicial discretion and upon a proper showing, has the authority to grant a voluntary dismissal without prejudice during the pendency of a motion for summary judgment."). Accordingly, "[e]ven when a summary judgment motion is pending, the court may grant a voluntary nonsuit without prejudice but to do so is discretionary with the court and plaintiff cannot move for dismissal as a matter of right." Nancy Fraas MacLean & Matthew Jeffrey MacLean, 6 Tenn. Prac., Civil Procedure Forms § 41:2 (2007).

The Walls argue on appeal that the trial court abused its discretion by not allowing them to voluntarily dismiss their action without prejudice. A review of the circumstances surrounding the court's determination leads us to the conclusion that the trial court did not abuse its discretion.

First, the parties had entered into an agreement providing that if the plaintiffs failed to file responsive briefs on or before August 26, 2005, the motions for summary judgment would be granted. The plaintiffs did not file a response to the summary judgment motion by the stated date, and the affidavits and other factual evidence in the record support the Defendants' motion. The trial court relied on the prior agreement, stating that the Defendants had twice agreed to continuances and that the parties had reached an agreement which "required Plaintiffs to file responsive briefs on or before Friday, August 26, 2005." The denial of the Walls' request to voluntarily dismiss their complaint without prejudice was consistent with the prior agreement of the parties and order of the court.

The Walls assert that the circuit court abused its discretion because their reason for attempting to dismiss their action was their need to find a new expert witness after their previous expert became uncooperative. When a court has denied a plaintiff permission to dismiss his or her action in order to obtain an expert witness after summary judgment motions have been filed, Tennessee appellate courts have been disinclined to find an abuse of discretion. In *Wishon v. Ear, Nose, & Throat Associates, PC*, No. E2001-01031-COA-R3-CV, 2001 WL 1523355 (Tenn. Ct. App. Nov. 29, 2001) (no Tenn. R. App. P. 11 perm. app. filed) the court noted that the plaintiffs "gave no plausible reason for their need to non-suit, other than obtaining their medical expert and taking testimony," and, consequently, concluded that the trial court did not abuse its discretion in denying the plaintiffs the right to voluntarily dismiss their action without prejudice. 2001 WL 1523355, at * 2.

Similarly, this court has concluded that the trial court did not abuse its discretion where it denied permission to dismiss without prejudice even though the court had excluded the plaintiff's expert witness. *Lewis ex rel. Lewis v. Brooks*, 66 S.W.3d 883, 887 (Tenn. Ct. App. 2001). Simply stated, where a plaintiff has failed to produce an expert to testify in a medical malpractice case and then been denied permission to voluntarily dismiss without prejudice, this court has been disinclined to find an abuse of discretion. *See also Anderson v. John P. Howser M.D., P.A.,* No. W2000-00937-COA-R3, 2001 WL 1011460, at *3 (Tenn. Ct. App. Aug. 30, 2001) (no Tenn. R. App. P. 11 perm. app. filed).

Bolstering the trial court's decision herein is the fact that the Walls made no showing that they were likely to find a qualified expert who would provide evidence contradicting the documentary and testimonial evidence that Ms. Wall only received 3 mgs. of Dilaudid rather than 30 mgs. The Walls simply sought leave to search for an expert. Where plaintiffs fail to make any showing that they are likely to secure expert testimony and the hopes of finding such an expert are merely speculative, a discretionary voluntary dismissal without prejudice may be improper. *Millsap by Millsap v. Jane Lamb Memorial Hosp.*, 111 F.R.D. 481, 484 (S.D. Iowa 1986).

Furthermore, in the approximately two years since the alleged over-medication of Ms. Wall, the Plaintiffs failed to present any evidence to the circuit court to support their theory that 30 mgs. of Dilaudid rather than 3 mgs. was given to Ms. Wall. Defendants presented testimony from Dr. Faour, the treating physician, from an expert witness Dr. Seger, and Ms. Wall's medical records to

establish that she received the proper dosage of 3 mgs. Not only have the Walls failed to offer any proof to contradict the Defendants' proof, they have not explained how they might be able to find contradictory proof. They simply offered the hope they will eventually be able to find an expert witness to replace Dr. Byas-Smith.

The only theory of negligence in this case is the allegedly incorrect dosage of Dilaudid, and it is unclear how an expert would be able to contradict the factual proof presented by the Defendants showing that Ms. Walls was never given the incorrect dosage. Plaintiffs' counsel conceded at oral argument that there was not any significant further information that the Walls could have provided to the court with regard to the facts of what happened. The only way an expert's testimony would create a dispute of fact as to what dosage Ms. Walls was administered would be testimony that the respiratory arrest was attributable to a 30 mg. dosage of Dilaudid or that it would not have happened with a 3mg. dosage, or if the expert could dispute the Defendants' evidence that a 30 mg. dosage would have likely killed Ms. Walls.

The Walls did not explain how they would be able to obtain expert testimony that would be sufficient to raise a dispute of material fact. Where a plaintiff's action is "lacking evidentiary support and . . . there is no indication that sufficient evidentiary support will be provided in the future," a court may properly determine that the plaintiff should not be able to dismiss his or her action without prejudice while a summary judgment motion from an adverse party is pending. *Gray ex rel. Gray v. Magee*, 864 A.2d 560, 565-66 (Pa. Super. Ct. 2004).

During oral argument, the Walls asserted that the trial court abused its discretion by failing to conduct a hearing on their notice of voluntary dismissal. The Walls contend that it became incumbent upon the trial court to hold what they label a *Wishon* hearing, in reference to *Wishon v. Ear, Nose, & Throat Associates, PC*, 2001 WL 1523355, to determine if this case presents a proper set of circumstances for a voluntary dismissal without prejudice. Although no transcript of the proceedings was made, the parties do agree that a hearing was held on September 23, 2005 during which the merits of the Walls' notice of voluntary dismissal were addressed.

That this hearing was not labeled a *Wishon* hearing does not negate the fact that the court conducted a hearing in which the parties addressed the merits of the Walls' attempt to voluntarily dismiss their action without prejudice, even if that discussion occurred during a hearing on the motions for summary judgment. Thus, we find unavailing the Walls' contention that the trial court abused its discretion by failing to hold a hearing on the merits of their notice of voluntary dismissal.

The Walls also argue that the trial court was required to consider certain factors that are set forth in *Wishon* and that the court abused its discretion by failing to consider these factors and by failing to make findings thereupon. The *Wishon* court noted that "[i]n exercising [their] discretionary authority to grant a non-suit, courts will consider factors such as the defendant's time, expense and effort, plaintiff's delay or lack of diligence in prosecuting his [or her] action, insufficient explanation of the need for the non-suit, and whether the non-suit is solely to avoid an adverse result." *Wishon*, 2001 WL 1523355, at *2.

Contrary to the Walls' interpretation of *Wishon*, the case does not establish a mandatory checklist of factors that must be considered and addressed. The *Wishon* court itself did not even address all of the factors. *Wishon,* 2001 WL 1523355, at *2. In addressing questions of whether the trial court abused its discretion by permitting or disallowing a plaintiff to voluntarily dismiss his or her action without prejudice, Tennessee courts have simply not treated these factors as a mandatory or exclusive requirements that must be addressed. *See e.g.*, *Oliver v. Hydro-Vac Servs. Inc.*, 873 S.W.2d at 695-96; *Anderson v. John P. Howser M.D., P.A.*, No. W2000-00937-COA-R3-CV, 2001 WL 1011460, at *2-3 (Tenn. Ct. App. Aug. 30, 2001) (No Tenn. R. App. P. 11 application filed).

While the factors set out in *Wishon* may be relevant in many cases, we construe them to simply be examples of the kinds of evidence that establish whether a "proper set of circumstances" exists for the grant of a voluntary nonsuit without prejudice. In any event, the failure of a trial court to record findings thereupon or to indicate how the court considered each factor is not an abuse of discretion. The Walls have failed to identify a statutory or common law requirement that courts must produce explanations of their thought processes in denying a plaintiff's request for a voluntarily dismissal of his or her action while a defendant's summary judgment motion is pending, much less a requirement to address specifically the *Wishon* factors.

As for the *Wishon* factors, although lacking specific findings or a transcript from the September 23, 2005 hearing, the conclusion can be readily inferred from the existing record that these weigh in favor of the trial court's decision not to allow a voluntary dismissal. Those factors are: (1) a defendant's time, expense and effort, (2) a plaintiffs' delay or lack of diligence in prosecuting his or her action, (3) insufficient explanation of the need for the non-suit, and (4) whether the non-suit is solely to avoid an adverse result.

Both sets of Defendants prepared and filed separate summary judgment motions. An affidavit from the treating physician Dr. Faour, Ms. Walls' medical records, and the opinion of an expert witness were presented to the court. Clearly, preparation of these motions and obtaining and organizing evidentiary support was the result of effort that was time consuming and costly. Meanwhile, in almost two years since the incident and almost one year since the action, the Walls failed to present any evidence to the court to show that Ms. Wall received 30 mgs. rather than 3 mgs. of Dilaudid.

From the record before us, it appears the Walls failed to indicate what efforts they had made at securing an expert witness, what testimony they expected such a witness to provide, how close they were to securing a new expert, or what evidence they expected an expert witness would be able to present. It also appears that the only reason the Walls sought a voluntary dismissal was to avoid having summary judgment awarded to the Defendants. Accordingly, from the record available to us, the *Wishon* factors appeared to weigh against a finding that the circuit court abused its discretion.

In summary, we conclude that the trial court appropriately exercised its discretion in denying the plaintiffs a dismissal without prejudice in light of all the circumstances.

IV. THE GRANT OF SUMMARY JUDGMENT

The Walls also argue that the trial court erred in granting summary judgment to the Defendants. Since the plaintiffs were not allowed to nonsuit their case, which decision we have affirmed, the trial court was left with a decision on whether the grant the Defendants' motions for summary judgment based on the Rule 56 filings then before it. The Walls did not seek a continuance, as authorized in Tenn. R. Civ. P. 56.07, but it is doubtful that one would have been granted in view of the prior continuances and the agreed order.

The Walls did not submit any evidence to refute the Defendants' evidence that Ms. Wall was only given 3 mgs. of Dilaudid rather than the 30 mgs. that the plaintiffs allege. Thus, the filings in the record show that there is no genuine issue of material fact and that the Defendants are entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Blair v. West Town Mall*, 130 S.W.3d, 761, 764 (Tenn. 2004); *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). Summary judgment was accordingly warranted in this case. As the trial court stated that "[t]here is nothing in this case to litigate. The entire case would rise or fall on the allegations of negligence by the Defendants' resulting in [Ms. Wall] being injected with 30 mgs. of Dilaudid which would probably have killed her. This just did not happen."

V. CONCLUSION

For the reasons discussed above, we affirm the trial court's order denying the Walls permission to voluntarily dismiss their action without prejudice and awarding summary judgment to the Defendants. We tax the cost of this appeal to the Walls and their surety, for which execution may issue.

PATRICIA J. COTTRELL, J.